LPA Fact sheet

LIVE PERFORMANCE AUSTRALIA

Annual Leave in the Live Performance Industry

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Annual Leave in the Live Performance Industry

The NES entitlement to Annual Leave

The National Employment Standards are ten minimum standards that apply to all employees in the National System. This fact sheet focuses on annual leave, the entitlement to take paid time off work for rest and recreation.

While awards, enterprise agreements and contracts can provide for more generous annual leave entitlements than those set out in the NES, they cannot operate to undercut this minimum standard.

Key facts:

- An employee (other than a casual employee) accrues four weeks of annual leave per year. This includes weekly employees in the live performance industry, even if they are only employed for a very short period of time.
- Annual leave accrues progressively, based on the employee’s ordinary hours of work.
- Accrued annual leave accumulates from year to year – any unused annual leave in one year will carry over to the next
- The NES provides that annual leave is paid at the employee’s base rate of pay for ordinary hours of work during the period. **Note:** this is a minimum standard which may be supplemented or modified by awards or enterprise agreements. This is discussed further below.
- When employment comes to an end, accrued and unused annual leave is paid out at least the rate the employee would have received if the leave was actually taken.
- Generally, annual leave does not accrue during a period of unpaid leave.
- Modern awards and enterprise agreements may provide additional terms regarding the cashing out or taking of annual leave. This is discussed further below.

Taking annual leave

If an employee wishes to take annual leave, he or she must request the leave and have it approved by his or her employer.

The NES provides that an employer must not unreasonably refuse a request for annual leave. This means that an employer can refuse a request if there are reasonable grounds to do so.

Whilst reasonable grounds for refusing annual leave are not listed in the NES, employers may choose to take into account a broad range of factors such as

- The reason for the request,
- The duration of the requested period,
- The effect on a production or show; or
- The implications of the request on other staff.

Employees covered by the Live Performance Award

As outlined above, whilst the NES sets minimum standards with regard to annual leave, industrial instruments such as awards or enterprise agreements may add further detail. The following information relates to employees covered by the Live Performance Award 2010. If you are unsure whether the Award covers your employees, please contact LPA.

Payment for annual leave

Employees paid by electronic funds transfer (EFT) may be paid in accordance with their usual pay cycle while on paid annual leave.

Employers may choose to pay employees their annual leave in advance before commencing a period of leave, but they are not required to do so. The exception is for annual leave loading, which is discussed further below.

Annual leave loading

Historically, leave loading was paid to compensate workers for additional amounts received in the course of work that would not be payable during a period of paid leave, such as overtime and allowances.

Once an employee has completed 12 months of continuous service, he or she is entitled to leave loading of 17.5% of the ordinary weekly wage. Leave loading is to be paid before the employee goes on leave.

Leave loading is paid on annual leave taken. It is also paid on unused leave paid out on termination, unless the employee is dismissed for misconduct.

Annual leave in advance

An employee can take a period of annual leave in excess of their accrual, as long as the employer agrees.

If an employer permits an employee to take annual leave in advance, the agreement must be set out in writing and be signed by both parties, and the employee's parent or guardian if the employee is under 18.

If the employee resigns or is dismissed before they have been employed for an sufficient length of time to accrue the leave, the employer can deduct a sum of money from the employee's final pay - an amount equivalent to what the employee was paid but did not accrue.

> **E.g.** Greg has worked for his employer for 6 months but is eager to take a four week holiday to visit the UK for a wedding.
>
> Although he has only accrued two weeks leave at the time, his employer accepts his application for leave in advance. On his return, he decides to resign.

It would have taken Greg 1 year of continuous service to accrue the four weeks leave he was paid during his trip. Greg's employer is able to withhold the overpaid amount from his final pay.

Cashing out of annual leave

An employee and employer can come to a written agreement to "cash out" annual leave (pay a sum of money to reduce the accrual) instead of the employee taking the leave.

This written agreement must spell out how much annual leave is to be cashed out and the payment made for it (which must be equivalent to the amount the employee would have received if he or she took the leave). The employer must also specify the date on which the payment will be made.

This written agreement must be retained as an employee record for at least seven years.

A maximum of 2 weeks of annual leave can be cashed out in any 12 months. A cashing out arrangement may not reduce an employee's annual leave accrual below 4 weeks.

Directions to take annual leave

Where an employee has accrued an "excessive accrual" of annual leave (defined in the award as a period of more than 8 weeks), an employer has the ability to direct the employee to take annual leave.

Before issuing such a direction, it is recommended that an employer try to reach agreement with the employee regarding the taking of leave.

There are a number of limitations on the ability to direct an employee to take leave:

- A direction cannot result in the employee's leave balance falling below 6 weeks
- The directed period cannot be less than one week
- The directed period cannot commence less than 8 weeks, or more than 12 months after the direction is given.
- The leave arrangement must not be inconsistent with any other leave arrangement made by the employer and employee (for example, it cannot override or cancel out a prior agreement to take leave).

If an employer refuses to allow an employee with an excessive accrual to take annual leave, similar powers exist to require the employer to grant this leave. The same conditions apply as above.

Lay off

Lay off is a period of time during which a performer is not required to perform any duties, but is still technically employed and receives remuneration. It is also known as "gardening leave".

Lay-off is often used during the move from one performance venue to another. Ideally, an employee's contract should outline that he or she may be laid off.

For employees to whom the award applies, lay off time is not deducted from annual leave. The PCA does allow lay off time to be made up of annual leave, however. This is discussed further below.

Employees covered by the Performers' Collective Agreement 2017

The following information relates to employees covered by the Performers' Collective Agreement 2017. If you are unsure whether the PCA covers your employees, please contact LPA.

Payment for annual leave - taking leave

If an employee is granted a period of annual leave, he or she must be paid the total negotiated rate, including any applicable loadings.

Annual leave payments must be paid to the employee *before* he or she commences the period of annual leave.

Payment for annual leave – on termination

Where an employee's employment ends before a period of 12 months has elapsed, the employer must pay out an amount equivalent to 1/12th of the employee's total negotiated earnings for the entire period of employment.

No leave loading is payable on any period of accrued annual leave of less than 12 months

As soon as an employee has been employed for a full 12 months of continuous service, he or she is entitled to four weeks annual leave

EXAMPLE 1

Simon's negotiated weekly rate is $1200 per week. He is employed for a total of 26 weeks and has not taken any annual leave in this time. During this period, his total negotiated earnings are $31,200.

- $31,200 / 12
- = **$2600 paid out on termination**

If Simon took leave, simply deduct the amount paid out from his final AL payment.

e.g. To calculate the daily annual leave amount, divide the weekly rate by 5 ($1200/5 = $240). In the above example, Simon would therefore be paid **$2360 ($2600 - $240)**

EXAMPLE 2

Jess has negotiated a weekly rate of $1700. She is employed for a total of 60 weeks and does not take any leave.

- $1700 x 4 weeks annual leave (accrued after 52 weeks service) = **$6800**
- Additional 8 weeks service (52 + 8 = 60 weeks)
  - = 0.6 weeks of annual leave accrued **= $1020**
- $6800 + $1020 **= $7820**
- $7820 + 17.5% annual leave loading = **$9188.50 payable on termination**

If Jess took a week's annual leave, you would deduct the monetary amount of the leave paid out. This would vary depending on whether the leave was taken before or after 12 months, as loading is only payable after 12 months cont service)

I.e. if 1 week's leave was taken prior to 12 months continuous service, deduct $1700

If 1 week's leave was taken after 12 months continuous service, deduct $1997.50 (1 week's salary plus 17.5%)

Annual leave loading

Once an employee has completed 12 months of continuous service, he or she is entitled to leave loading of 17.5% of the total negotiated rate which is paid when taking leave and on annual leave paid out on termination.

Annual leave in advance

An employee can take a period of annual leave in excess of their accrual, as long as the employer agrees.

If an employer permits an employee to take annual leave in advance, the agreement must be set out in writing and be signed by both parties, and the employee's parent or guardian if the employee is under 18.

If the employee resigns or is dismissed before they have been employed for an sufficient length of time to accrue the leave, the employer can deduct a sum of money from the employee's final pay - an amount equivalent to what the employee was paid but did not accrue. 34.8.1, 34.8.3, 34.13

Cashing out

Cashing out annual leave is not permitted under the PCA. 34.12

Directing to employees to take annual leave

An employee with <u>less than 6 months' continuous service</u> cannot be directed to take annual leave.

An employee with <u>more than 6 months but less than 12 months' continuous service</u> may be directed to take annual leave where a production is transferring from one city to another. If an employer directs an employee to take annual leave, the following conditions must be met:

- The employer must notify the MEAA
- The employer gives the employee at least 8 weeks' notice
- There is a minimum ten-day break between cities of ten days where the employee is not required to work or travel
- The employer must provide return air travel to allow the employee to return to his or her place of residence for the duration of the leave
- The employer must provide at least six weeks of employment following the employee's return, or re-credit the directed annual leave.
- A maximum of one week's annual leave may be directed, with the balance being made up of **layoff (explained further below)**

An employee with **<u>at least a year's continuous service</u>** can be directed to take annual leave at any time with the provision of at least 3 weeks' notice, or more, if this is practicable.

Layoff

Lay off is a period of time during which a performer is not required to perform any duties, but is still technically employed and receives remuneration. It is also known as "gardening leave".

An employee can be "laid off" for a maximum period of three weeks in any 26 week period.